In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 558.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ELECTRIC VACUUM CLEANER COMPANY, INC.,
INTERNATIONAL MOLDERS' UNION OF NORTH AMERICA, LOCAL NO. 430,
PATTERN MAKERS ASSOCIATION OF CLEVELAND AND VICINITY,
INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 54,
METAL POLISHERS' INTERNATIONAL UNION, LOCAL NO. 3, and
FEDERAL LABOR UNION NO. 18,907,
Respondents.

BRIEF OF RESPONDENT, ELECTRIC VACUUM CLEANER COMPANY, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

This cause grows out of a dispute for representation between the respondent unions herein called "A. F. of L." and United Electrical and Radio Workers of America, affiliated with the Congress of Industrial Organization, herein called "C.I.O."

There is no issue as to wages, hours, or the ordinary grievances between employer and employee. (Tr. 285, 724.)

The facts are not particularly involved, and are clearly and correctly set forth in the Court's opinion. (Tr. 867-875.)

STATEMENT.

The petitioner's statement is inaccurate and incomplete in certain respects, and these inaccuracies and omissions affect the proper consideration of the questions which petitioner seeks here to present. Respondent's only purpose in offering a brief restatement is to clear these inaccuracies and supply the omissions.

In June of 1935, and again in July of 1936, respondent entered into written contracts with A. F. of L. The term of each contract was one year, and the making of each contract by respondent was on the express consideration that A. F. of L. represented a majority of the employees. When the first contract was signed, A. F. of L. represented 608 out of a total of 799 employees, and at the time the second contract was signed, 771 out of a total of 809 employees. Each contract provided for exclusive representation by A. F. of L., which representation was evidenced and established, in each instance, by written authorizations signed by the individual employees (A. F. of L.'s Ex. 2, Tr. 865), which were exhibited to and checked by respondent. A copy of the form of written authorization is also included in the foot-note appended to the Court's opinion. (Tr. 868.) These authorizations recited, among other things, that the signer was a member of one of the A. F. of L. affiliates, and provided with respect to representation, and the period during which it was to continue and be effective:

> "* * * to represent me, and, in my behalf, to negotiate and conclude all agreements as to hours of labor, wages and other employment conditions. I also authorize the Company to deduct, within thirty days, from wages due, the prevailing initiation or reinstatement fee of the organization as indicated hereon and transmit same to the authorized representative of the organization.
>
> "The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me, and shall remain in full force and

effect for one year from date and thereafter, subject to thirty (30) days' written notice of my desire to withdraw such power and authority to act for me in the matters referred to herein."

This power of attorney for representation the petitioner refers to as a "membership authorization."

The making of the two contracts, and the authorizations for representation, and the fact that they were made freely and without interference or coercion on the part of the respondent, is undisputed.

At the time each written contract was made, there was likewise an accompanying oral agreement which provided as stated by the Court in its opinion (Tr. 868):

> "That in the future all new employees, after a probationary period of two weeks, should be compelled to join the appropriate craft union of A. F. of L., but that the old employees, of whom some 67 did not wish to join the A. F. of L., should not be compelled to do so,"

(old employees referring to those in the employ of respondent on the date of the making of the first contract in 1935).

In spite of the Court's finding, and the uncontradicted evidence in respect thereto, petitioner, in its statement, omits mentioning the application of the oral agreements to old employees, and likewise erroneously persists in referring to the oral agreements as being secret, and their terms not having been communicated to the employees. Not only were old employees covered but there was nothing secret. The shop committee of the employees was notified, the employees were advised not only by notices posted throughout the plant, but by their foreman and by the announcement that any employees who did anything to disturb the peaceful and friendly relations under the contract would be considered as working against the best interests of the company, and subject to discharge. (Tr. 263, 264, 265, 290, 291, 544, 688, 700, 750, 751, 785, 789, 792, 811 and 812.)

With respect to notice, the Court found (Tr. 873):

> "Knowledge of the terms of the agreement was received by the representatives who negotiated the contracts, while acting within the scope of their authority, and it is elementary that such notice to the union was notice at least to all but 38 of the men when the contract was signed in June, 1936. * * * It is uncontradicted on this record that new employees were to be given two weeks probation, and, if their work was satisfactory, they were then required to join the union. This arrangement was reasonable and in no way illegal. It is also uncontradicted that it was the duty of the appropriate craft union to solicit men for membership. The duty of notice in no case rested upon the respondent. * * * In a few cases, where new men employed stated they had no notice of the requirement, the union had merely failed to perform its function of signing them up. This dereliction cannot rightfully be charged to the respondent."

In March, 1937, a few of the old employees started organizing a local union to be affiliated with C.I.O. This attempt to organize workers brought about the alleged unfair acts with which respondent is charged, namely, cooperation with A. F. of L., and resulted in a one-day sit-down strike, and a later closing of the plant. Prior to this time during the 1935 and 1936 contracts there had been no labor disputes of any kind between respondent and its employees.

When the plant was reopened after a two-week shut-down, the then existing contract (1936) was supplemented to require A. F. of L. membership for all employees. This supplementing did not mean an abandonment of the old contract or the making of a new one, as the petitioner contends, but was merely an enlargement of the existing contract, which, up to that time, required union membership by all employees, except the thirty-eight employees working when the 1936 contract was made but who had not signed written authorizations.

Shortly after the reopening of the plant, but still prior to the expiration of the then existing contract, negotiations for a third contract with A. F. of L. were had, which resulted in a contract being signed in May, 1937, which contract was a strictly closed shop contract. At the time this third contract was signed, the number of respondent's employees had increased, and respondent was presented with evidence that 910 of its then 1,032 employees had approved the new contract by signing duplicate copies, which approval was in the form following:

> "I, the undersigned, having read the above agreement hereby approve the making of the same by the unions, and during the term covered by said agreement and renewal thereof, while I am in the employ of Electric Vacuum Cleaner Company, Inc., I irrevocably designate the union as my particular bargaining agent, and agree to abide by all the terms and conditions of said agreement." (Tr. 43.)

It is undisputed—

(a) That the employees never revoked their respective authorizations for representation.

(b) That the 1935-1936 contracts, oral and written, were made with a labor organization which was not established, maintained or assisted by any unfair labor practice, and represented an uncoerced majority of the employees, and

(c) That at the time the supplement to the 1936 contract was made in April, and the third contract was concluded in May of 1937, the contract of 1936 was in full force, and the authorizations referred to in (a) above were outstanding and unrevoked.

The enforcement of the board's order finding that respondent had illegally assisted A. F. of L. and ordering reinstatement and back pay, on review, was denied by the court.

QUESTIONS CLAIMED TO BE PRESENTED BY PETITIONER.

Petitioner propounds the following five questions, the first two of which are improperly premised on the oral agreements being secret, and applying to new employees only:

> 1. "Whether the respondent by virtue of its 1935 and 1936 agreements with the union as to the membership of new employees was protected by the proviso of section 8 (3) of the Act in compelling the union membership of old employees."
>
> 2. "Whether the oral and secret understanding with the union at the time the 1935 and 1936 contracts were signed was sufficient to invoke the protection of the proviso of section 8 (3) even as to the new employees."

The oral agreements required union membership of all but a few of the old, as well as of all the new employees. They were not secret. They had been negotiated by the respondent with the authorized representatives of its employees. At the time of the making of each contract, the labor organization contracted with was not maintained by any unfair labor practice, and represented an uncoerced majority of the employees. The agreements were supported by written authorizations for representation, which were likewise freely executed.

The court below very properly held that "the mandate of the proviso is not limited to the usual closed shop; it does not require that the condition of membership in the union contracted with should attach to men previously employed, as well as to those employed in the future."

The contracts being fully within the terms of the proviso at the time made, that status would not be lost until the contracts terminated, and respondent was therefore protected by the proviso with respect to old as well as new employees.

3. "Whether the 1935 and 1936 agreements, read in the light of revocable membership applications signed by the union members, implied an undertaking by those employees not to change their union affiliation during the life of the 1935 and 1936 agreements."

The authorizations for representation, which are referred to by petitioner as membership applications, while revocable after one year, were never revoked. Furthermore, the authorizations include a declaration of membership in A. F. of L. and being the consideration for the making of the contracts, not only implied an undertaking by such employees not to change their union affiliation during the year, but justified the employer in relying on there being no change of representation during each year's term of the contracts or thereafter, unless and until written notices were given. The attempted change of affiliation to C.I.O. involved a change of representation as well.

This question, however, is entirely moot, and does not arise inasmuch as none of the employees withdrew their representations as to union affiliation or revoked the authorizations for representation.

4. "Whether, assuming there was such undertaking, the respondent by coercion and discrimination may discourage the employees from advocating toward the close of the contract period a change in union affiliation."

The application of the word "advocating" to the acts of the employees during the period in question is hardly proper. The "advocating" took the form of a sit-down strike, of soliciting employees to deliberately disregard their commitments to respondent and brought about the closing of respondent's plant, threatening the total destruction of its rights under its contract. Such "advocating," the court below very properly held the respondent had the right to discourage.

A consideration of question 5 involves the 1936 contract, and the unrevoked authorizations for representation.

5. "Whether the favored union had been maintained and assisted by the respondent, prior to the 1937 closed-shop agreement, so that this agreement is not entitled to the protection of the proviso of section 8 (3) of the Act."

The board itself decided that the 1936 contract was executed when A. F. of L., pursuant to written authorizations, represented a majority of the employees, and in such representation had not been assisted by any unfair labor practices of the respondent.

The 1937 closed shop agreement was made while the 1936 contract was in full force and effect, and with the duly designated representatives of at least 85% or more of the employees, and under such circumstances is entitled to the full protection of the proviso of Section 8 (3) of the Act.

REASONS FOR DENYING THE WRIT.

The first of the two reasons urged by petitioner for granting certiorari is predicated largely on facts not supported by the evidence, or the court's findings, in that it assumes that the contracts are limited to new employees, that the terms of the contracts are secret, and disregards the fact that at the time of the occurrence of the acts complained of none of the outstanding authorizations for representation by A. F. of L. had been revoked.

The 1935 and 1936 agreements, while termed preferential closed-shop agreements, were, as the court below held, "in the nature of closed shop agreements, for eventually, as the old men dropped out, the contracts were renewed, and a genuine closed shop would be established."

Old employees who were not members of a union in June of 1935 were not required to join a union. At the time the 1936 contract was made, there were only 38 men in this class. The old employees, upon joining the union, necessarily abandoned their exempt classification, and having joined and executed authorizations for representation

were required to continue as union members. New employees not joining after the probationary period, were subject to discharge. All A. F. of L. members, and all new employees were accordingly working under an agreement which differed in no respect from a strictly closed-shop agreement: Such of the old employees as did not join A. F. of L. were, nevertheless, subject to the contract insofar as their activities were limited to doing nothing which would disturb respondent's relations with A. F. of L., and to that extent their right to participate in any activities or be affiliated with any union that interfered with A. F. of L.'s contract was prohibited.

Petitioner urges that the acts of respondent after March of 1937 were illegal acts of assistance of A. F. of L., which disqualified the respondent and A. F. of L. from entering into any contracts, and therefore the April and May contracts were not within the proviso of Section 8 (3) citing *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, as controlling. This decision was fully considered by the court below, and the facts analyzed and distinguished from those in the present case, it being the court's conclusion that "International Machinists case does not hold that an employer who has made a valid contract with a union, looking toward a closed shop, may not take action pursuant to negotiations with the exclusive bargaining representatives under the Act, to prevent the entrance of a rival union into its plant and the consequent disruption of industrial peace."

The court also had before it the following cases, which the petitioner again refers to in its petition for certiorari:

Hamilton-Brown Shoe Company v. National Labor Relations Board, 104 Fed. (2d) 49, 54 (C. C. A. 8);

National Labor Relations Board v. National Motor Bearing Company, 105 Fed. (2d) 652, 659-660 (C. C. A. 9) and

National Labor Relations Board v. J. Greenebaum Tanning Company, 110 Fed. (2d) 984, 987 (C. C. A. 7),

which cases, on the facts, are likewise distinguishable.

The 1936 contract was signed in July of 1936, and, if not renewed, expired June 23, 1937. The acts complained of occurred during March and April of 1937. The proviso of Section 8 (3) with respect to the excepted type of contract for union representation is "* * * If such labor organization is the representative of the employees, as provided in section 9 (a) in the appropriate collective bargaining unit covered by such agreement *when made*." It is undisputed that the 1936 contract, when made, came within the terms of the proviso, and if so, the protection of the proviso unquestionably continued during the term of the contract.

The supplementing of the contract in April, and the making of the new contract in May, were further supported by the then outstanding and unrevoked authorizations appointing A. F. of L. as bargaining agent.

What respondent did in March, and thereafter, was solely in reliance that A. F. of L. then, and until the end of the term of its contract the following June, was the duly authorized representative of its employees, and that under the contract, it had the right and duty to cooperate to the extent that it did.

> "Employer's encouragement of membership in union which was representative of employees and with which employer had made agreement to employ only members of union and discouragement of membership in another union did not constitute an unfair labor practice within the National Labor Relations Act."
>
> *M. & M. Woodworking Company v. National Labor Relations Board*, 101 Fed. (2d) 938 (C. C. A. 9).

For its second reason, petitioner contends that the court below, without regard to Section 8 (3), and because

of the revocable "membership applications" (using petitioner's designation) signed by union members, held that it was an "implied term" of the 1936 contract, that the members of the A. F. of L. affiliates agreed, during the term of the contract, not to "discard membership in one union for membership in another," and that they "violated the contract when they tried to bring in a rival union, and became rightfully subject to discharge."

Petitioner states that there was no evidence to support any finding of an express undertaking of this nature. What the court did say was this:

> "The legal conclusion made by the Board that the members of the A. F. of L., after the 1935 and 1936 contracts were executed, were free to abandon such membership at will, when considered in the light of the authorizations signed by the men and the total failure to file withdrawals in accordance therewith, is plainly erroneous. So far as the understanding of the parties illuminates the meaning of the obligation, it is that the men were bound for the period defined in the authorizations. There was no testimony to the contrary." (Tr. 871.)
>
> "* * * These authorizations, running for a term of one year and thereafter, could be withdrawn upon thirty days' written notice; but the record presents no such withdrawal. The term of one year was reasonable and the authorizations were in every respect legal. Signing the authorizations entitled the men to the benefits of union membership, including the benefits of the contract between the respondent and the affiliated unions, and they in turn were bound thereby during the term of the authorizations. They were both ethically and legally bound not to disrupt the contract. It follows that any employees who were members of the A. F. of L., whether old or new men, violated the contract when they tried to bring in a rival union, and became rightfully subject to discharge. The National Labor Relations Act does not prohibit the effective discharge for repudiation by the employee of his agreement. *National Labor Relations Board v. Sands Mfg. Co.*, 306 U. S. 332, 344." (Tr. 872-3.)

It is clear from the foregoing, that there is no merit in petitioner's claim that "the court below therefore views such an undertaking as inherent in any exclusive union contract." The court had under consideration in this case a particular form of contract and authorization, which it proceeded to construe.

Furthermore, petitioner's policy and administration of the Act, with respect to the proviso in Section 8 (3), as reflected by its decisions in other matters, instead of being handicapped by the decision of the court below, as it now claims, is in harmony with that decision, and we call attention to *In the Matter of J. E. Pearce Contracting and Stevedoring Company, Inc.*, and *International Longshoremen and Warehousemen's Union, Local 2-5*, decided February 29, 1940, and reported in 20 N. L. R. B. 1061, the headnote of which reads:

> "Stevedore Industry—Interference, Restraint, and Coercion: charges of, dismissed—Discrimination: employer's reliance upon a preferential-employment contract in awarding preference in employment to members of contracting union held valid despite transfer of allegiance by a substantial number of the members of the contracting union to another labor organization; disestablishment of contracting union by International and substitution of a new local in the place of the contracting union as a disciplinary measure against employees who transferred their allegiance, held not to dissipate the preferential-employment contract—Collective Bargaining; charges of refusal to bargain collectively dismissed—complaint: dismissed."

The contract in the cited case was made in September, 1937, the acts complained of occurred in July, 1938, and the contract was renewed in September, 1938. There was no claim that when the contract was executed in September, 1937, the union was assisted by any unfair practices or that it did not represent a majority, and it was therefore held to come within the proviso of Section 8 (3) of the Act. The board in supporting its decision refers, among other

cases, to *M. & M. Woodworking Company v. National Labor Relations Board*, 101 F. (2d) 938 (C. C. A. 9), *supra*, and *In the Matter of Ansley Radio Corporation*, 18 N. L. R. B. 1028.

CONCLUSION.

It follows that the reasons relied upon by the petitioner neither establish that the decision below is in conflict with, or departs from, the decision of this and other courts, nor that it raises any question of importance in the administration of the Act, and that therefore the petition for writ of certiorari should be denied.

Respectfully submitted,

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